

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LAMPARELLI CONSTRUCTION COMPANY, INC.</b>	:	DETERMINATION
		DTA NO. 819886
for Revision of a Determination or for Refund of Real	:	
Estate Transfer Tax under Article 31 of the Tax Law	:	
for the Period December 21, 2001.	:	

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Petitioner, Lamparelli Construction Company, Inc., 590 Kennedy Road, Cheektowaga, New York 14227, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the period December 21, 2001.

On December 29, 2004 and January 11, 2005, respectively, petitioner by its representative, John J. Lavin, Esq., and the Division of Taxation, by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by May 13, 2005, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly determined that petitioner was not entitled to a continuing lien deduction pursuant to Tax Law § 1402(a) for the conveyance resulting from a foreclosure of four townhouses from one grantor to one grantee, where the consideration was equal to the mortgage indebtedness on the property.

***FINDINGS OF FACT***

1. On December 21, 2001, a transfer of real property occurred between Carl P. Paladino, referee, as grantor, and Lamparelli Construction Company, Inc. (“petitioner”), as grantee. The property conveyed consisted of four townhouses located at 4293, 4295, 4297 and 4299 Tisbury Lane, Hamburg, New York.

2. On February 28, 2002, a Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate, Form TP-584, was filed reporting the conveyance between the referee, Carl P. Paladino, and petitioner. The Condition of Conveyance, as reported on the return, was a conveyance pursuant to or in lieu of foreclosure or enforcement of a security interest. The amount of consideration reported for the conveyance totaled \$2,914,275.44. Petitioner claimed a Continuing Lien Deduction in the amount of \$2,914,274.44 and reported taxable consideration in the amount of \$1.00.

3. The Division of Taxation (“Division”) performed an audit of the Real Estate Transfer Tax Return and determined an additional amount of tax was due for the conveyance at issue. The Division reasoned that as the conveyance consisted of four single-family dwellings rather than a conveyance of a single-family dwelling, petitioner was not entitled to exclude from the consideration received the value of any lien or encumbrance remaining on the property at the time of the conveyance. On January 22, 2004, the Division issued to petitioner a Notice of Determination assessing real estate transfer tax in the amount of \$11,658.00, plus penalty and interest.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1402(a) provides for the imposition of real estate transfer tax:

on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two or three family house and an individual residential condominium unit, or interests therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyances.

B. The term “conveyance” is defined in Tax Law § 1401(e) as “the transfer or transfers of any interest in real property by any method, including but not limited to . . . mortgage foreclosure [and] transfer in lieu of foreclosure . . . .” The term “consideration” is defined, in relevant part, in Tax Law § 1401(d), as:

the price actually paid or required to be paid for the real property or interest therein . . . . It shall include the cancellation or discharge of any indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to.

C. The transfer at issue herein is a single conveyance of four townhouses pursuant to foreclosure. The consideration for the conveyance was \$2,914,275.44, which is comprised of the amount of preexisting mortgages, liens or other encumbrances remaining on the property after the conveyance in the amount of \$2,914,274.44 and the amount of foreclosure judgment or price bid by the grantee of \$1.00. The conveyance at issue herein is not a transfer of “a one, two or three family house,” or “an individual residential condominium unit, or interest therein” as required for entitlement to the continuing lien deduction provided for in Tax Law § 1402(a)(A). Instead, the conveyance is one transfer of an undivided interest consisting of four townhouses.

D. The consideration for the conveyance at issue is not less than five hundred thousand dollars as required by Tax Law § 1402(a)(B). As the definition of consideration states, consideration includes the amount of any mortgage, lien or encumbrance remaining on the property transferred. In the present matter, the consideration is \$2,914,275.44. As such, the conveyance is not entitled to the continuing lien deduction, and petitioner may not exclude the value of any lien or encumbrance remaining thereon at the time of the transfer.

E. In *Matter of Arbor Hill* (Tax Appeals Tribunal, June 26, 1997), the Tribunal addressed the issue of multiple parcels of property conveyed in one deed. The case involved the transfer of 27 commercial parcels from one grantor to one grantee, pursuant to a single deed, where the sole consideration was equal to the mortgage indebtedness on the property. The conveyance was pursuant to one agreement between the parties and reported on one real property transfer tax return. The Tribunal held that the conveyance was subject to transfer tax, finding that:

The instant situation presents facts which establish one transfer of one undivided interest in real property accomplished by execution of a deed. The consideration for the undivided interest in the real property conveyed was established by the underlying agreement to convey the real property in lieu of foreclosure for the remaining balance on the two mortgages encumbering all of the parcels constituting the real property. The unity of title, interest in fee, the definition of real property and the indivisibility of the consideration as established by the mortgage balances all lead to the inescapable conclusion that there was but one conveyance.

As in *Arbor Hill*, the conveyance at issue herein involved a transfer of an undivided interest in four townhouses, the consideration of which is the amount of preexisting mortgages, liens or encumbrances. Similarly, the single conveyance of four townhouses may not be segregated and treated as four separate conveyances of a one, two or three family house. Finally, as in *Arbor Hill*, the preexisting mortgage balances were the consideration for the entire conveyance.

F. Petitioner's claim that it received property of zero value is misplaced. Consideration for purposes of the real estate transfer tax includes the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to. Therefore, the consideration for the conveyance, as reported on the return, totals \$2,914,275.44, which is subject to the real estate transfer tax pursuant to Tax Law § 1402(a).

G. Petitioner asserts that it should not be liable for the real estate transfer tax because impending litigation involving an entity with an additional mortgage on the property at issue may result in petitioner's divestiture of any interest in the property. This assertion is without merit. The real estate transfer tax is imposed on conveyances pursuant to foreclosure, and consideration includes the amount of any preexisting mortgages, liens or encumbrances. As the return filed by petitioner indicates, a conveyance pursuant to foreclosure occurred on December 21, 2001, with petitioner as grantee. Whether another mortgagor may subsequently foreclose on its mortgage does not alter the fact that petitioner is the transferee of a conveyance pursuant to foreclosure. Although not established by the record, assuming *arguendo* that another entity has an outstanding mortgage on the property, petitioner merely took the property subject to such mortgage, which amount is included in the computation of consideration (Tax Law § 1401[d]). As such, the conveyance is subject to the real estate transfer tax as imposed by Tax Law § 1402, and petitioner is not entitled to a continuing lien deduction.

H. The petition of Lamparelli Construction Company, Inc. is denied, and the Notice of Determination dated January 22, 2004 is sustained.

DATED: Troy, New York  
June 30, 2005

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE